80-547

Supreme Court, U. S.
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IN THE

SUPREME COURT of the UNITED STATES

Fall Term, 1980

No. ———

CHARLES E. WALLIN and
MADGE M. WALLIN,
Husband and Wife,
Petitioners,

vs.

CITY OF PORT TOWNSEND and
PORT TOWNSEND LIBRARY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Fristoe, Taylor & Schultz, Ltd., P.S.
By: Don W. Taylor
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The Printery

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QUESTIONS PRESENTED

1. Was the Petitioner, Madge M. Wallin, deprived of constitutional rights guaranteed to her by the First and Fourteenth Amendments to the United States Constitution by the termination of her employment as punishment because of her exercise of her right of free speech?

2. Was the Petitioner, Madge M. Wallin, deprived of constitutional rights guaranteed to her by the Fifth and Fourteenth Amendments of the United States Constitution by the refusal of the City of Port Townsend and its Library Board to provide a hearing upon the termination of her employment, which refusal was a denial of her right of procedural due process?

3. Was the Petitioner, Madge M. Wallin, deprived of constitutional rights guaranteed to her by the First, Fifth and Fourteenth Amendments to the United States Constitution by the Trial Court's refusal to place upon the Respondents, the City of Port Townsend and its Library Board, the burden of proving that her dismissal was not predicated upon her exercise of her First Amendment rights?

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IN THE

SUPREME COURT of the UNITED STATES

Fall Term, 1980

No. _____

CHARLES E. WALLIN and
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vs.

CITY OF PORT TOWNSEND and
PORT TOWNSEND LIBRARY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above cause on June 18, 1980, denying a Petition for Review and sustaining the decision of the Court of Appeals of the State of Washington, Division II, entered on April 1, 1980.

I.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of the State of Washington, Division II, attached hereto as Appendix A, is an unpublished opinion.

The Order of said Court of Appeals denying the Motion for Reconsideration is attached hereto as Appendix B.

The order of the Supreme Court of the State of Washington denying the Petition for Review is attached hereto as Appendix C.

The Mandate from the Court of Appeals, certifying that the opinion of the Court of Appeals filed on April, 1980, became the decision terminating review, is attached hereto as Appendix D.

II.

JURISDICTION

1. The decision and judgment of the Court of Appeals of the State of Washington, Division II, was entered on April 1, 1980.

2. The Order Denying Motion for Reconsideration was entered by said Court of Appeals on April 11, 1980.

3. The order of the Supreme Court of the State of Washington denying the Petition for Review was entered on June 18, 1980.

4. The Mandate of the Court of Appeals terminating review was entered on June 23, 1980.

5. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3), providing for review by Writ of Certiorari where any title, right, privilege or immunity is set up or claimed under the Constitution of the United States of America.

III.

QUESTIONS PRESENTED

1. Was the Petitioner, Madge M. Wallin, deprived of constitutional rights guaranteed to her by the First and Fourteenth Amendments to the United States Constitution by the termination of her employment as punishment because of her exercise of her right of free speech?

2. Was the Petitioner, Madge M. Wallin, deprived of constitutional rights guaranteed to her by the Fifth and Fourteenth Amendments of the United States Constitution by the refusal of the City of Port Townsend and its Library Board to provide a hearing upon the termination of her employment, which refusal was a denial of her right of procedural due process?

3. Was the Petitioner, Madge M. Wallin, deprived of constitutional rights guaranteed to her by the First, Fifth and Fourteenth Amendments to the United States Constitution by the Trial Court's refusal to place upon the Respondents, the City of Port Townsend and its Library Board, the burden of proving that her dismissal was not predicated upon her exercise of her First Amendment rights?

IV.

CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Constitution of the United States, Amendment XIV, Section 1.:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V.

STATEMENT OF THE CASE

A. NATURE OF ACTION

The Petitioners, Plaintiffs below, seek to reverse the final decision of the Supreme Court of the State of Washington sustaining the Court of Appeals of the State of Washington, Division II, sustaining a judgment of the Superior Court of the State of Washington for Jefferson County dismissing the Complaint of the Plaintiffs seeking damages resulting from the Plantiff's, Madge M. Wallin, discharge as librarian for the Port Townsend Library.

B. PLEADINGS AND PROCEEDINGS

The Petitioners commenced an action in the Superior Court of the State of Washington for Jefferson County seeking damages resulting from the discharge of the Petitioner, Madge M. Wallin, as librarian for the Port Townsend Library. Issue was joined and the case was tried, resulting in a judgment dismissing the action.

The Petitioners appealed to the Court of Appeals of the State of Washington, Division II, which affirmed the Trial Court's judgment, except for a small modification, in an Unpublished Opinion filed April 1, 1980. (Appendix A) The Petitioners' Motion for Reconsideration was denied on April 11, 1980. (Appendix B) Thereafter, the Petitioners petitioned the Supreme Court of the State of Washington for a review, which Petition was denied by an order of the Supreme Court on June 18, 1980. (Appendix C) The Mandate terminating appellate review by the Courts of the State of Washington was entered on June 23, 1980. (Appendix D) This Petition for a Writ of Certiorari followed.

C. STAGE WHERE FEDERAL QUESTIONS RAISED

The federal questions presented by this Petition for Writ of Certiorari were first raised during the trial of the action in the Superior Court of the State of Washington for Jefferson County. These issues were renewed before both the Court of Appeals of the State of Washington, Division II, and the Supreme Court of the State of Washington.

D. STATEMENT OF FACTS

In August, 1965, the Petitioner, Madge M. Wallin, was hired as librarian for the library of the City of Port Townsend. She served in that capacity until the end of June, 1976. During her eleven (11) years as librarian, she was instrumental in making many improvements to the library. These improvements included a substantial addition of books to the collection, improvements to the physical plant and the establishment of library services to those unable to come to the library to use the same.

Madge M. Wallin was well regarded in the community of Port Townsend. This fact is attested to by the approximately 500 people who signed a petition for her reinstatement. This opinion of Madge M. Wallin was apparently shared, on at least one occasion, by one of the Library Board members who was instrumental in her termination. On an earlier date, he wrote a letter favorable to Madge M. Wallin. Former Board members evidenced their support of Madge M. Wallin by joining in the petition for her reinstatement.

Subsequent to her termination, the Petitioner, Madge M. Wallin, did request a hearing and received community support in this request. She was not afforded a legal hearing.

During the years of her employment, the Petitioners were outspoken on public issues. During these times, Joseph B. Steve served either as mayor or councilman of Port Townsend. During the latter years, Oliver Frank Kilham served on the Library Board. Many of the issues in which the Petitioners were involved received publicity in the press, part of which publicity was caused by the Petitioners. The publicity included:

1. Their protest of the encroachment upon library property by a developer of property adjoining the library. The developer was a member of the City Council.

2. Their protest of the construction by the City of Port Townsend of an equipment barn. The Petitioners were property owners in the vicinity.

3. Their protest of the garbage disposal contract.

4. A dispute involving the conversion of the Marine Hospital to low-rent housing.

5. Their proposal for utilization of city buildings.

6. A dispute concerning the restoration of the Bell Tower.

7. Their protest of the unification of the offices of Clerk and Treasurer for the City of Port Townsend.

8. Their opposition to the House Bill 170, a proposed statute before the Washington legislature which involved a change in the library system.

9. A dispute concerning "weeding" of the library collection (selective removal of library volumes).

The issue of House Bill 170 and "weeding" were bitter and placed the Petitioners in direct conflict with Oliver Frank Kilham, a Board member who participated in the termination of the Petitioner, Madge M. Wallin. The Library Board and the City Council of Port Townsend agreed with the position of the Petitioners on House Bill 170. Mr. Kilham did not. At various meetings throughout the state attended by Mr. Kilham and the Petitioner, Madge M. Wallin, Mrs. Wallin called to the attention of those in attendance that Mr. Kilham's position on House Bill 170 was his personal position and did not represent the position of the Library Board or the City. During the Course of the trial, the Petitioner, Madge M. Wallin, testified as follows:

> "I worked without conflict for 8½ years until the library legislation came out, when Mr. Kilham and I had the confrontation."

There was a substantial difference of opinion between Mr. Kilham and the Petitioners with respect to "weeding". The Petitioners' position appears to be supported by the Library Trustees' Practical Guidebook. This issue disintegrated into public accusations of book burning.

After the termination of Madge M. Wallin, the mayor of the City of Port Townsend stated, from the rostrum at a City Council meeting, to the Petitioner, Charles E. Wallin:

> "You have not enhanced yourself in the community, nor have you enhanced your wife's position as librarian."

During the trial, when asked how her right of free speech was affected, the Petitioner, Madge M. Wallin, testified:

> "I spoke out on many issues of controversy in this community and I feel I lost my position because of it."

The Petitioner, Madge M. Wallin, contended that the allegations set forth in the termination of her employment were false, which allegations contained accusations with respect to "weeding" of the collection, release of library information to the press and public and disruption of Library Board meetings. These allegations were made public.

VI.
ARGUMENT

A. FREEDOM OF SPEECH

The learned trial judge, in analyzing the evidence, commented as follows:

> "I don't think that anyone could have prevented Mrs. Wallin (Petitioner herein) from expressing her opinion. I was not able to do it."

Clearly, the evidence establishes that the Petitioners exercised the constitutionally guaranteed right of free speech. Unfortunately, they were punished by Respondents for the exercise of this right. Such action is constitutionally forbidden. The principles contained in *Perry v. Sindermann,* 408 U.S. 593 (1972), apply to this appeal. *Perry* involved Robert Sindermann, a teacher in the state college system of the state of Texas. After teaching two years at the University of Texas and four years at San Antonio Junior College, Sindermann became a professor of Government and Social Science at Odessa Junior College in 1965. During the 1968-69 academic year, he was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees at the Texas legislature, and he became involved in public disagreements with the policies of the college Board of Regents. In particular, Sindermann aligned himself with a group which advocated the elevation of the college to a four-year status, a change opposed by the Regents. On one occasion, a newspaper advertisement highly cirtical of the Regents appeared over Sindermann's name. In May of 1969, Sindermann's one-year employment contract was terminated and the Board of Regents voted not to offer him a new contract. The Regents issued a press release containing allegations of Sindermann's insubordination. Sindermann was not allowed an opportunity for hearing to challenge the basis of removal.

Sindermann then brought action in Federal District Court. He contended that he was dismissed because of his public criticism of the policy of the college administration and that the dismissal infringed upon his right of freedom of speech. He also alleged that the failure of the college to provide him with a hearing violated the Fourteenth Amendment guaranty of procedural due process. The District Court granted summary judgment in favor of the Regents of the college on the ground that Sindermann had "no cause of action against the (Petitioners) since his contract of employment terminated May 31, 1969, and Odessa Junior College had not adopted the tenure system." The Court of Appeals reversed and the United States Supreme Court affirmed the Court of Appeals.

This Court stated:

> "The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the non-renewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.
>
> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly'. *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible."

This court further stated:

> "Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton v. Tucker, supra,* (364 U.S. 479, 485-486); *Keyishian v. Board of Regents, supra,* (385 U.S. 589, 605-606). We reaffirm those holdings here."
>
> • • •
>
> "For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering v. Board of Education, supra.*" (391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811)
>
> *Perry, supra,* at 598.

Clearly, the evidence in the present case established that the Petitioner, Madge M. Wallin, was punished for her exercise of her constitutionally guaranteed right of free speech.

B. PROCEDURAL DUE PROCESS

In effect, the Petitioner, Madge M. Wallin, was terminated upon what she contends to be a false charge of insubordination. Immediately after her termination, the Petitioner, Madge M. Wallin, requested a hearing upon the termination. Although this request was vigorously pursued, no hearing was held.

RCW 27.12.210(3) of the statutes of the state of Washington empowers the board of library trustees to:

> "Employ a librarian, and upon his recommendation employ such other assistants as may be necessary, all in accordance with the provisions of RCW 27.08.010, prescribe their duties, fix their compensation, and remove them for cause;" (Emphasis Ours)

This statute requiring removal for cause clearly gives the Petitioner, Madge M. Wallin, a sufficient property interest in her continued employment to secure to her procedural due process.

Robert Sindermann's second claim in *Perry v. Sindermann, supra,* was based upon a denial of procedural due process. He alleged that his employment status, though not secured by a formal contractual tenure provision, was such that he was entitled to a hearing prior to his dismissal. He offered to prove that a teacher with his long period of service had at least a property interest in continued employment and had no less a procedural due process right to a statement of reasons and a hearing before his employment could be terminated.

This Court stated:

> "We have made clear in *Roth, supra,* at 577, 92 S.Ct., at 2709, that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings'. *Id.,* at 577 92 S.Ct., at 2709. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*
>
> A written contract with an explicit tenure provision clearly is evidence of a formal understanding the supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' "

Perry, supra, at 601, 602.

The allegations made against the Petitioner, Madge M. Wallin, in her notice of termination were charges that might seriously damage her standing and associations in her community. Charges of insubordination with respect to information provided by a library collection and release of library information to press and public certainly place her good name, reputation, honor and integrity at stake. Under these circumstances, notice and an opportunity to be heard are essential. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972).

Clearly, the right of procedural due process was denied to the Petitioner, Madge M. Wallin when her demand for hearing was rejected.

C. BURDEN OF PROOF

The Trial Court erroneously refused to place upon Respondents the burden of proving that the Petitioner's, Madge M. Wallin, dismissal was not predicated upon her exercise of her constitutional rights. The Appellate Courts of the State of Washington did not rule upon this issue. This Court has directly addressed this issue.

Elrod v. Burns, 427 U.S. 357 (1976) involved the discharge of an employee of the Cook County Sheriff's Office after the election of a Democratic sheriff. The respondent, John Burns a Republican, was discharged upon the new sheriff assuming office. Burns was a non-civil service employee whose employment was not covered by statute, ordinance or regulation. This Court held that the practice of patronage dismissals infringes upon the First Amendment rights of the individual.

This Court stated:

> "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley v. Valeo,* 424 U.S._____, at 64-65; *NAACP v. Alabama,* 357 U.S. 449, 460-461 (1958). 'This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct.

> . . .' *Buckley v. Valeo, supra,* at 65. Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest'. *Kusper v. Pontikes,* 414, U.S._____, at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. *Buckley v. Valeo, supra,* at 94; *Williams v. Rhodes,* 393 U.S._____, at 31-33; *NAACP v. Button,* 371 U.S. 415, 438, 444 (1963); *Bates v. Little Rock,* 361 U.S. 516, 527 (1960) *NAACP v. Alabama, supra,* at 464-466; *Thomas v. Collins,* 323 U.S. 516, 530 (1945)."
>
> *Elrod, supra,* 427 U.S. at 362.

The Petitioners Wallin submit that had the Trial Court correctly applied the rules with respect to burden of proof, casting the burden of proof upon the Respondent, the Respondent would have failed in its attempt to prove that the Petitioner, Madge M. Wallin, was terminated for reasons other than in the exercise of her constitutional rights.

VII.

CONCLUSION

The Courts below have deprived the Petitioners of the rights guaranteed them by the First, Fifth, and Fourteenth Amendments of the Constitution of the United States of America. The decision of the Supreme Court of the State of Washington, which affirmed the decision of the Court of Appeals of the State of Washington, Division II, should be reversed and this matter remanded to the Superior Court of the State of Washington for Jefferson County for a new trial.

DATED at Olympia Washington, this 14th day of August, 1980.

Respectfully submitted.

FRISTOE, TAYLOR & SCHULTZ, Ltd., P.S.

By: Don Taylor

Don W. Taylor

Attorneys for Petitioners

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHARLES E. WALLIN and
MADGE M. WALLIN, husband
and wife,

Appellants,

v.

CITY OF PORT TOWNSEND and
PORT TOWNSEND LIBRARY,

Respondents.

NO. 3917-II
Division Two

UNPUBLISHED OPINION

Filed April 1, 1980

PETRIE, J.—Charles and Madge Wallin, husband and wife, appeal from a judgment dismissing their complaint against the City of Port Townsend and its library for damages resulting from Mrs. Wallin's discharge as librarian for the Port Towsend Library. We affirm the judgment as modified herein.

On appeal plaintiffs assign error to a series of finding of fact, the totality of which express the trial judge's opinion that the city had sustained its burden to prove that Mrs. Wallin was discharged for a series of work deficiencies and not, as plaintiffs had contended, as punishment or retribution for Mrs. Wallin's repeated exercise of the right of free speech. The record amply supports the trial court's findings; and we must, therefore, accept them as verities on appeal. *Sylvester v. Imhoff,* 81 Wn.2d 637, 503 P.2d 734 (1972).

Plaintiffs also contend that Mrs. Wallin's employment could be terminated only by the mayor, not by the library board which notified

her of her discharge. Under authority of RCW 35.24.020, the mayor of a third class city has power to appoint library trustees; but the trustees, under RCW 27.12.210(3), then have authority to hire a librarian and assistants "and remove them for cause." The specific provisions of the latter statute control the issue.

Finally, the plaintiffs contend Mrs. Wallin was not given sufficient notice of her discharge. We agree. Library board policy dictated that terminations "shall be preceded by written notice twenty working days in advance of the terminating date whenever possible." Mrs. Wallin was notified on June 11, 1976 that her employment would terminate on June 30. The city did not demonstrate any reason for failure to give Mrs. Wallin the requisite notice established by board policy. We have no knowledge of the librarian's work week. Nevertheless, Mrs. Wallin's discharge did not become effective until twenty working days after June 11. She should be paid for those twenty days. *Johnson v. Pacific Bank & Store Fixture Co.*, 59 Wash. 58, 109 P. 205 (1910). If the parties cannot agree to the amount of salary Mrs. Wallin has not yet received, the trial court is directed to decide that issue upon presentation of evidence confined to that issue only.

Judgment affirmed as modified herein.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

WE CONCUR:

/s/ Reed, J.

/s/ Petrie, J.

/s/ Johnson, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

CHARLES E. WALLIN and MADGE M. WALLIN, husband and wife,

Appellants,

v.

CITY OF PORT TOWNSEND and PORT TOWNSEND LIBRARY,

Respondents,

No. 3917-II

Order Denying
Motion for
Reconsideration

The court has considered this motion for reconsideration and has determined that it should be denied. Accordingly, it is

ORDERED that the motion is denied.
DATED this 11th day of April, 1980

cc: Don W. Taylor
Glenn Abraham

ORDER DENYING MOTION

FOR RECONSIDERATION

APPENDIX C

THE SUPREME COURT
State of Washington
Olympia
98504

June 19,1980

Fristoe, Taylor & Schultz
Mr. Don W. Taylor
Suite l, Professional Arts Bldg.
Olympia, Washington 98501

Mr. Glenn Abraham
Attorney at Law
823 Washington Street
Port Townsend, Washington 98368
Counsel:

Re: Supreme Court No. 47010-3 Wallin, et ux v. City of Port Townsend Court of Appeals No. 3917-6-II.

At its En Banc Administrative Conference held on June 18, 1980, the Court denied the Petition for review in the above entitled case which was previously set on the June 6, 1980 Petition for Review Docket.

Very truly yours,

John J. Champagne
Clerk

JJC:et

cc: Court of Appeals, Division II

APPENDIX D

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

CHARLES E. WALLIN AND MADGE M. WALLIN,
husband and wife
Appellants,

vs.

CITY OF PORT TOWNSEND AND
PORT TOWNSEND LIBRARY,
Respondents

MANDATE
No. 3917-II
Jefferson County No. 9001

The State of Washington To: The Superior Court of the State of Washington in and for Jefferson County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 1, 1980, became the decision terminating review of this court in the above entitled case on June 18, 1980. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

cc: Don W. Taylor
Glenn Abraham

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 23rd day of June, 1980

Leslie Stomsvik
Clerk of the Court of Appeals,
State of Washington
Division II